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Munawar Ahmad Anees v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPLICATION NO 07–4 OF 2007(W)
ZAKI AZMI CHIEF JUSTICE, NIK HASHIM AND ZULKEFLI FCJJ
17 DECEMBER 2008

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Constitutional Law — Courts — Federal Court — Inherent powers of — Whether inherent power of Federal Court under r 137 of the Rules of the Federal Court 1995 ('RFC') could be invoked to confer jurisdiction to Federal Court in absence of jurisdiction conferred by s 87 of the Courts of Judicature Act 1964 ('CJA') 1964 — Whether r 137 applicable only in limited circumstances — Whether attempts to relitigate matters heard and determined by Court of Appeal as apex court constitute such limited circumstances — Rules of the Federal Court 1995 r 137 — Courts of Judicature Act 1964 s 87

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Constitutional Law — Courts — Federal Court — Jurisdiction, meaning of — Whether exercise of any power by Federal Court should only flow from its vested jurisdiction — Rules of the Federal Court 1995 r 137 — Courts of Judicature Act 1964 s 87

F

Constitutional Law — Courts — Jurisdiction of Federal Court — Whether Federal Court seised with jurisdiction to hear criminal matter originating in sessions court and heard by High Court in its appellate capacity — Whether inherent power of Federal Court under r 137 of the RFC could be invoked to confer jurisdiction to Federal Court in absence of jurisdiction conferred by s 87 of the CJA — Rules of the Federal Court r 137 — Courts of Judicature Act 1964 s 87

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Criminal Procedure — Appeal — Appellate court, power and duty of — Appellant absent during hearing of appeal in High Court — Whether to allow hearing of appellant's appeal in his absence would constitute abuse of process of court — Whether High Court entitled to dismiss such appeal — Criminal Procedure Code s 313(2)

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Criminal Procedure — Jurisdiction of court — Federal Court — Whether Federal Court seised with jurisdiction to hear criminal matter originating in sessions court and heard by High Court in its appellate capacity — Whether inherent power of Federal Court under r 137 of the RFC could be invoked to

confer jurisdiction to Federal Court in absence of jurisdiction conferred by s 87 of the CJA 1964 — Rules of the Federal Court 1995 r 137 — Courts of Judicature Act 1964 s 87

Words and Phrases — 'Court' — Rules of the Federal Court 1995 r 137

Words and Phrases — 'Jurisdiction' — Courts of Judicature Act 1964 s 87

The applicant pleaded guilty in the sessions' court to a charge under s 377D of the Penal Code. He was convicted and sentenced to six months' imprisonment. The applicant appealed to the High Court. He failed to attend court on the hearing of the appeal, prompting the High Court judge to dismiss the appeal pursuant to s 313(2) of the Criminal Procedure Code ('CPC'). The applicant appealed to the Court of Appeal which dismissed his appeal. The applicant then motioned the Federal Court under r 137 of the Rules of the Federal Court 1995 ('RFC') to: (i) review and set aside the order of the Court of Appeal; and (ii) order the High Court to hear his appeal on the merits.

Held, dismissing the application:

(1) The case of the applicant originated from the sessions court. The High Court had heard the case in its appellate rather than original capacity and the applicant had exhausted his rights of appeal at the Court of Appeal. Therefore, the Federal Court could not deal with the matter for want of jurisdiction, pursuant to s 87 of the Courts of Judicature Act 1964 ('CJA'). Pursuant to s 87 of the CJA, the Federal Court is seised with jurisdiction to hear an appeal in a criminal matter, decided by the High Court in its original jurisdiction (see paras 7, 10 & 12); *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101 distinguished; *Ngan Tuck Seng & Anor v Ngan Yin Groundnut Factory Sdn Bhd* [1999] 5 MLJ 509 and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 referred and *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753 followed.

(2) In the absence of jurisdiction conferred by s 87 of the CJA, r 137 of the RFC — being a procedural law — could not be invoked to confer jurisdiction to the Federal Court to review a case. Rule 137 may only be invoked in limited circumstances. Attempts to relitigate a matter heard and determined by the apex court, ie the Court of Appeal — such as in the instant case — do not constitute limited circumstances

envisaged by r 137 (see paras 6, 13–14); *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 followed.

(3) Rule 137 of the RFC was promulgated for the purpose of regulating the practice and procedure to be followed by the Federal Court in matters in which the Federal Court has jurisdiction. Jurisdiction denotes the scope or authority over a subject matter which the court may deal with. The court may exercise its power in relation and pursuant to its jurisdiction. The exercise of any power by the court must as a matter of course flow from the jurisdiction vested in that court and not otherwise (see para 15); *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771 referred and *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1 followed.

(4) The word 'court' in the phrase 'to prevent an abuse of the process of the court' in r 137 means the Federal Court and a judge of the Federal Court. Rule 137 does not confer an inherent power — it merely declares that the Federal Court has such power. In the instant case, it was very clear that there was no room to invoke r 137 (see para 18); *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753 followed.

(5) In the instant case, the High Court judge had carefully considered the scope and application of s 313(2) of the CPC and its application to the present case. The Federal Court would agree with the judge's conclusion that to allow the hearing of the applicant's appeal in his absence would constitute an abuse of the process of the court. In the exercise of his discretionary power under s 313(2) of the CPC, the High Court judge was justified in refusing to consider the appeal and in dismissing the appeal (see para 23).

[Bahasa Malaysia summary

Pemohon telah mengaku bersalah di mahkamah sesyen terhadap pertuduhan di bawah s 377D Kanun Keseksaan. Dia disabitkan dan dihukum enam tahun penjara. Pemohon telah merayu ke Mahkamah Tinggi. Dia gagal untuk menghadiri perbicaraan rayuan tersebut, menyebabkan hakim Mahkamah Tinggi menolak rayuan tersebut menurut s 313(2) Kanun Prosedur Jenayah ('KPJ'). Pemohon merayu kepada Mahkamah Rayuan yang telah menolak rayuannya. Pemohon kemudiannya memohon usul kepada Mahkamah Persekutuan di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP') untuk: (i) menyemak dan mengenepikan perintah Mahkamah Rayuan; dan (ii) perintah Mahkamah Tinggi untuk mendengar rayuannya atas merit.

Diputuskan, menolak permohonan: A

(1) Kes pemohon bermula di mahkamah sesyen. Mahkamah Tinggi telah mendengar kes tersebut dalam kapasiti rayuannya dan bukan kapasiti asal dan pemohon telah menggunakan semua hak rayuannya di Mahkamah Rayuan. Oleh itu, Mahkamah Persekutuan tidak boleh B mengendalikan perkara tersebut kerana tiada bidang kuasa, menurut s 87 Akta Mahkamah Kehakiman 1964 ('AMK'). Menurut s 87 AMK, Mahkamah Persekutuan mempunyai bidang kuasa untuk mendengar rayuan dalam hal jenayah, yang diputuskan oleh Mahkamah Tinggi dalam bidang kuasa asalnya (lihat perenggan 7, 10 & 12); *Tan Sri Eric* C *Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101 dibeza; *Ngan Tuck Seng & Anor v Ngan Yin Groundnut Factory Sdn Bhd* [1999] 5 MLJ 509 dan *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 dirujuk dan *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753 diikut. D

(2) Dalam ketiadaan bidang kuasa yang diberikan oleh s 87 AMK, k 137 KMP — yang merupakan undang-undang prosedur — tidak boleh digunapakai untuk memberikan bidang kuasa kepada Mahkamah Persekutuan untuk menyemak sesuatu kes. Kaedah 137 hanya boleh E digunapakai dalam keadaan-keadaan terbatas. Percubaan untuk melitigasi semula perkara yang telah dibicarakan dan ditentukan oleh mahkamah tertinggi, iaitu Mahkamah Rayuan — seperti di dalam kes ini — tidak merangkumi keadaan-keadaan terbatas seperti yang digambarkan oleh k 137 (lihat perenggan 6, 13–14); *MGG Pillai v Tan* F *Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 diikut.

(3) Kaedah 137 KMP telah diisytiharkan bertujuan untuk mengawal amalan dan prosedur yang perlu diikut oleh Mahkamah Persekutuan dalam hal-hal yang mana Mahkamah Persekutuan mempunyai bidang G kuasa. Bidang kuasa menunjukkan bidang atau autoriti ke atas sesuatu hal yang mana mahkamah boleh berurusan dengannya. Mahkamah boleh melaksanakan kuasanya berkenaan dan menurut bidang kuasanya. Pelaksanaan mana-mana kuasa oleh mahkamah perlu dibuat daripada bidang kuasa yang diberikan kepada mahkamah tersebut dan H tidak sebaliknya (lihat perenggan 15); *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771 dirujuk dan *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1 diikut.

(4) Perkataan 'mahkamah' di dalam frasa 'untuk mengelak penyelewengan proses mahkamah' di dalam k 137 bermaksud Mahkamah Persekutuan I dan seorang hakim Mahkamah Persekutuan. Kaedah 137 tidak memberikan kuasa sedia ada — ia hanya mengesahkan bahawa Mahkamah Persekutuan mempunyai kuasa sedemikian. Dalam kes ini, amat jelas bahawa Mahkamah Persekutuan tidak mempunyai kuasa

sedemikian untuk membangkitkan k 137 (lihat perenggan 18); *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753 diikut.

(5) Dalam kes ini, hakim Mahkamah Tinggi telah dengan berhati-hati mempertimbangkan bidang dan penggunaan s 313(2) KPJ dan penggunaannya dalam kes ini. Mahkamah Persekutuan akan bersetuju dengan keputusan hakim bahawa untuk membenarkan perbicaraan rayuan pemohon dengan ketiadaannya akan membentuk penyalahgunaan proses mahkamah. Di dalam pelaksanaan kuasa di bawah s 313(2) KPJ, hakim Mahkamah Tinggi adalah betul dalam menolak untuk mempertimbangkan rayuan tersebut dan dalam menolak rayuan ini (lihat perenggan 23).]

Notes

For cases on appellate court, power and duty of, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 189–256.

For cases on Federal Court, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1919–1921.

For cases on jurisdiction of Federal Court, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2291–2297.

Cases referred to

Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor [2008] 3 MLJ 771; [2008] 5 CLJ 1, FC (refd)

Hayati bte Aizan v PP [2000] 1 MLJ 359, HC (refd)

Lee Lee Cheng (f) v Seow Peng Kwang [1960] MLJ 1, FC (folld)

Lee Weng Tuck & Anor v PP [1989] 2 MLJ 143, SC (refd)

MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673, FC (folld)

Ngan Tuck Seng & Anor v Ngan Yin Groundnut Factory Sdn Bhd [1999] 5 MLJ 509, HC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008 5 CLJ 201, FC (folld)

Tan Sri Eric Chia Eng Hock v PP (No 1) [2007] 2 MLJ 101; [2007] 1 CLJ 565, FC (distd)

Legislation referred to

Courts of Judicature Act 1964 s 87
Criminal Procedure Code 1965 ss 305, 313(2)
Penal Code s 377D
Rules of the Federal Court 1995 r 137

Appeal from: Criminal Appeal No W-0–31 of 2003 (Court of Appeal, Putrajaya)

Manjeet Singh Dhillon (Balwant Singh Sidhu & Co) for the applicant.
Eddie Yeo Soon Chye (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zulkefli FCJ (delivering judgment of the court):

[1] By way of a notice of motion in encl (2a) the applicant is moving this court to invoke its power under r 137 of the Rules of the Federal Court 1995 ('RFC') to review and to set aside the order made by the Court of Appeal on 30 October 2007 in Criminal Appeal No W-09–31 of 2003. The applicant is also seeking the inherent powers of this court under r 137 of the RFC for an order that the Kuala Lumpur High Court Criminal Appeal No 42–44 of 1998 be heard on its merits. This application has been dismissed. We now give our reasons.

[2] The applicant was charged at the sessions court for an offence under s 377D of the Penal Code as follows:

> Bahawa kamu, dalam bulan Mac 1993, pada sebelah malam, di No 8, Jalan Setia Murni 1, Bukit Damansara, dalam Wilayah Persekutuan, Kuala Lumpur telah melakukan perbuatan kelucahan melampau dengan Dato' Seri Anwar Ibrahim dengan membenarkan Dato' Seri Anwar Ibrahim memasukkan zakarnya ke dalam dubur kamu dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 377D Kanun Keseksaan.

[3] The applicant pleaded guilty to the said charge and was convicted and sentenced on 19 September 1998 by the learned judge of the Sessions Court Kuala Lumpur to six months imprisonment with effect from the date of arrest.

[4] On 29 September 1998, the applicant filed a notice of appeal in the High Court in Criminal Appeal No 42–44 of 1998 against the decision made by the sessions court. On 9 September 2003, the learned High Court judge, in exercising his powers under s 313(2) of the Criminal Procedure Code ('CPC') refused to consider the appeal and thereafter dismissed the appeal on the basis of the absence of the applicant on the day fixed for the hearing of the appeal.

[5] On 11 September 2003, the applicant filed a notice of appeal in the Court of Appeal in Criminal Appeal No W-09–31 of 2003 against the decision of the High Court and the Court of Appeal upon hearing the appeal by the applicant dismissed the appeal on 30 October 2007.

[6] Based on the affidavit in support of the application, it is clear that the applicant is seeking to relitigate on an issue pertaining to the conviction and sentence meted out on the applicant on his own admission of guilt.

[7] Learned counsel for the applicant in his submission on the issue of whether the application is properly before this court and as to whether this court has jurisdiction to hear it has referred to us the case of *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101; [2007] 1 CLJ 565 wherein the Federal Court then went on to rule that it could consider the appellant's motion under r 137 of the RFC in a matter which arose out of a Kuala Lumpur Sessions Court criminal trial. Learned counsel for the applicant further submitted that the power of the Federal Court to hear any application or to make any order as may be necessary to prevent injustice under r 137 has been recognised in a plethora of cases and he cited the cases of (1)*Ngan Tuck Seng & Anor v Ngan Yin Hoi* [1999] 5 MLJ 509; (2) *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

[8] Although mindful of the later decision of the Federal Court in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201 wherein the Federal Court refused to consider a civil application under r 137 arising from a sessions court civil action on the grounds that it had no jurisdiction to do so and that the inherent power under r 137 was 'limited' to review of the Federal Court decisions only, learned counsel for the applicant contended that several distinguishing features and observation can be made between *Eric Chia*'s case and *Sia Cheng Soon*'s case as follows:

(1) *Sia Cheng Soon* was a three member coram that did not overrule the five member decision in *Eric Chia*;

(2) *Sia Cheng Soon* recognised that the Federal Court concerns itself with 'points of law';

(3) *Sia Cheng Soon* did not concern any issue of violations of fundamental rights or constitutional safeguards, the denial eg for a full and fair hearing;

(4) *Sia Cheng Soon* was a matter that had been fully heard, argued and considered in all the courts below the Federal Court; and

(5) In *Sia Cheng Soon* there had been an earlier application made for leave to appeal from the Court of Appeal which application had been dismissed.

[9] It is also the submission made on behalf of the applicant that there are now conflicting Federal Court decisions on the scope and applicability of

r 137 and the court's inherent power to matters originating from the subordinate courts and that the case of *Eric Chia* has not been overruled and is a correct statement of the law in so far as r 137 is concerned.

[10] As to the above contention and arguments made by learned counsel for the applicant, with respect we could not agree with him. We are of the view since the case of the applicant originated from the sessions court and the High Court had heard this case in its appellate capacity and not acting under its original jurisdiction and wherein the applicant had exhausted his rights of appeal at the Court of Appeal, it therefore follows that the Federal Court could not deal with this matter for want of jurisdiction as stipulated under s 87 of the Courts of Judicature Act 1964 ('CJA'). Section 87 of the CJA provides as follows:

> 87 Jurisdiction to hear and determine criminal appeals
>
> (1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal.
>
> (2) ...
>
> (3) An appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

[11] In view of the above provisions in s 87 of the CJA, the Federal Court is only reposed with the jurisdiction to hear an appeal from the decision '*in respect of any criminal matter decided by the High Court in its original jurisdiction*' (Emphasis added). On this point in the case of *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* His Lordship Zaki Tun Azmi PCA (as he then was) in his judgment had succinctly stated at pp 764–765 (paras 34–36) of MLJ and p 215 (paras 35–37) of CLJ as follows:

> Section 87 relates to the Federal Court's jurisdiction to hear and determine criminal appeals. This section allows appeals of any criminal matter decided by the High Court in its original jurisdiction only. It does not provide for appeals in criminal appeals originating in the subordinate courts.
>
> According to s 50(1), criminal cases decided by the sessions court may be appealed up to the Court of Appeal ... Section 50 read with s 87 means that, criminal matters originating in the sessions court must end at the Court of Appeal.
>
> I do not read r 137 as meaning to provide another avenue to bring a case originating in the subordinate court to the Federal Court. On an important matter as right of appeal these sections being provisions passed by Parliament, cannot now

A be read as being subject to a procedural r 137 made by the rules committee. A right of appeal is a substantive right, not a procedural right.

[12] As regards the case of *Tan Sri Eric Chia Eng Hock v Public Prosecutor* relied on by the applicant, it is to be noted even the Federal Court then explained that the appellant could not proceed with his appeal to the Federal Court for want of jurisdiction under s 87 of the CJA. His Lordship Richard Malanjum CJ (Sabah and Sarawak) in delivering the judgment of the court had this to say (at p 113):

C My answer therefore to the primary question is that an exercise of revisionary power by a High Court judge is not an exercise of an original jurisdiction so as to bring it within the ambits of s 87 of the CJA.

For the above reasons, the notice of appeal filed by the accused in this court is therefore struck out for want of jurisdiction under s 87 of the CJA.

D

[13] It is our considered view in the absence of jurisdiction such as provided by s 87 of the CJA, r 137 of the RFC being a procedural law, could not be invoked to confer jurisdiction to the Federal Court to review a case. E It must be stated here however that the Federal Court had consistently emphasised that r 137 could be invoked only in limited circumstances. In *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 at p 685 the Federal Court with reference to r 137 explained that:

F For the reasons stated, I hold the view that the Federal Court does have the inherent jurisdiction and power which can be invoked in limited circumstances to reopen, rehear and reexamine its previous judgment, decision or order which has been obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court.

G

[14] Based on the above statement of the law made by the Federal Court and reverting back to the factual circumstances of the present application, it is our considered view to relitigate a case which has been heard and disposed of by the apex court, ie the Court of Appeal, is therefore not one of the H circumstances envisaged by r 137 for this court (the Federal Court) to entertain.

[15] It must be noted that the said r 137 of the RFC has been promulgated primarily for the purpose of regulating the practice and procedure to be I followed by the Federal Court in all causes or matters in or with respect to which the Federal Court has for the time being jurisdiction. Jurisdiction denotes the scope or authority over a subject matter which the court may deal with. The court may then exercise its power in relation and pursuant to that jurisdiction. In this context, in the case of *Abdul Ghaffar bin Md Amin v*

Ibrahim bin Yusoff & Anor [2008] 3 MLJ 771; [2008] 5 CLJ 1, the Federal Court referred to the case of *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1 wherein the court explained the difference in the terms 'jurisdiction' and 'power' as follows (at p 3):

> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here used repeatedly. This leads to the view that in the ordinance there is a distinction between the jurisdiction of a court and its powers, and this suggests that the word jurisdiction' is used to denote the types of subject matter which the court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.

[16] From the principles as explained above, it could be gathered that the exercise of any power by the court must as a matter of course flow from the jurisdiction vested in the court and not otherwise.

[17] Still on the issue of whether this court has the jurisdiction to hear the applicant's present application under r 137 of the RFC, learned counsel for the applicant made an alternative submission that should this court be of the view that the capital '*C*' for court restricts r 137 to the Federal Court then such limitation or qualification, if at all it is there, is limited to the second limb of '*abuse of the process of the Court*'. It was further submitted that the disjunctive 'or' between the words '*prevent injustice*' and '*prevent an abuse of the process of the Court*' will permit of a wider and more liberal interpretation to the power to correct an injustice.

[18] With utmost respect to the above contention of learned counsel for the applicant, we could not agree with him. On this point, we are more persuaded by the reasoning of the Federal Court in the case of *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim*. His Lordship Zaki Tun Azmi, PCA (as he then was), inter alia, stated that the '*Court*' mentioned in the content of '*to prevent an abuse of the process of the Court*' is spelt with a capital '*C*'. Rule 2 of the RFC defined the word '*Court*' (also with capital '*C*') to mean the Federal Court and includes a judge of that court. It was further decided that the word 'the Court' by the use of the capital '*C*' and the definition given to that word in the rules musts mean the Federal Court. In the same case Arifin Zakaria FCJ (as he then was) at p 219 paras 49 and 50 decided that the rule in r 137 of the RFC merely declares '*... that nothing in these Rules shall be deemed to limit or alter the inherent powers of the Court*'. The word '*Court*' here is defined as the Federal Court (r 2). His Lordship then went on to state that the rule does not confer an inherent power, it merely declares that the court has such a power.

A **[19]** We are therefore of the view on the issue of whether this court has the jurisdiction to hear the applicant's application, it is patently clear that there is no room to invoke r 137 of the RFC and on this ground alone the applicant's application should be dismissed.

B **[20]** Learned counsel for the applicant in his submission before this court had also argued at great length on the scope of s 313(2) of the CPC and on the constitutional right of a litigant to a right of hearing. It was contended for the applicant that both the High Court and the Court of Appeal in the present case had erred in the failure to properly consider and apply s 313(2) C of the CPC. Simply for this reason to ascertain whether in fact the High Court and the Court of Appeal had erred, we would take the liberty here to deal with this issue, notwithstanding that we had earlier ruled that this court does not have the jurisdiction to hear the plaintiff's application under r 137 of the RFC.

D

[21] Section 313(2) of the CPC in so far as it applies to the instant matter provides:

E (1) ...

(2) If the appellant does not appear to support his appeal the Court may consider his appeal and make such order thereon as it thinks fit:

> F Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction ..., except on such terms as it thinks fit to impose.

[22] It is the submission of learned counsel for the applicant that even if the G applicant as the appellant is absent the court can consider an appeal and that to consider an appeal it must mean to consider it on its merits. It is the contention made on behalf of the applicant that the court has no power to arbitrarily dismiss an appeal without considering it on merits, but if the absent appellant is out of jurisdiction then the court can refuse to consider H the appeal unless and until the absent appellant complies with such terms the court has seen fit to impose. Learned counsel for the applicant also submitted to us that the prayer of the applicant is not to set aside the conviction but to allow him the opportunity of having his appeal argued on its merits in the High Court.

I

[23] Again, we could not agree with the submission made on behalf of the applicant on the interpretation of the scope of s 313(2) of the CPC and its application to the present case. We are of the view that the learned judge of the High Court had carefully considered the scope and application of

s 313(2) of the CPC in his well written judgment. The learned judge had stated in his judgment amongst others the reason why he had to dismiss the applicant's appeal without hearing its merits. The learned judge was of the view that since the applicant had failed to appear personally in court for his appeal to be heard on several occasions whereby the hearing of the appeal had to be repeatedly postponed, this would be a ground to justify the dismissal of the applicant's appeal. On this point the learned judge cited the case of *Hayati bte Aizan v Public Prosecutor* [2000] 1 MLJ 359 in which His Lordship Augustine Paul J (as he then was) had this to say (at p 363):

> In the appeal before me, the appellant had failed to appear personally in court on five occasions in pursuance of a condition upon which she was admitted to bail. It would be an abuse of the process of the court to adjourn the hearing of the appeal any further. I was therefore of the view that the discretion must be exercised in favour of the application made by the prosecution to dismiss the appeal. Thus I dismissed the appeal.

[24] The learned judge of the High Court also discussed on what would be the resultant effect of the hearing of the applicant's appeal in his absence and the powers vested in the court at the hearing of an appeal. The learned judge took into consideration of the fact that the applicant is out of jurisdiction (for being outside the country) and the court having the revisionary powers on appeal to impose a heavier sentence if the court finds the six months imprisonment meted out on the applicant is manifestly inadequate even though the public prosecutor did not appeal against the sentence. It is for this reason that the learned judge concluded that it was incorrect for learned counsel for the applicant to contend that just because the applicant had gone through the trial process before the sessions court and had served his sentence that he did not have to appear. The learned judge anticipated the possibility of enhancing the sentence passed on the applicant but the powers to enhance the sentence cannot be carried out in the absence of the applicant as he has the right to be heard. To the court the presence of the applicant at the hearing of the appeal is of paramount importance, but for his repeated absence it would be justified for the court to exercise its discretion to dismiss the appeal without considering its merits.

[25] Finally, it is noted that in dismissing the appeal the learned judge of the High Court had given due consideration to the fact that the appeal by the applicant was in relation to the applicant's conviction and sentence upon his own plea of guilt under s 305 of the CPC. Under the said provision of s 305 of the CPC the applicant cannot appeal against the conviction except as to the extent or legality of the sentence. Having referred to the procedure and principles of law as laid down in the Supreme Court's case of *Lee Weng Tuck & Anor v Public Prosecutor* [1989] 2 MLJ 143 the learned judge found that the recording of the plea of guilt made by the applicant was in order and

A according to law. From the records of appeal available before him there was nothing to show that the proceedings before the sessions court where the applicant had pleaded guilty was conducted not in accordance with the procedure and principles laid down in *Lee Weng Tuck*'s case.

B **[26]** For the reasons above stated we are in agreement with the conclusion arrived by the learned judge of the High Court that to allow the hearing of the appeal of the applicant in his absence would tantamount to an abuse of the process of the court. In the exercise of the discretionary power under s 313(2) of the CPC the learned judge was therefore justified in refusing to C consider the appeal and in dismissing the appeal.

[27] Accordingly, in the circumstances of the case we would dismiss the applicant's application in encl (2a).

D *Application dismissed.*

Reported by Andrew Christopher Simon

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